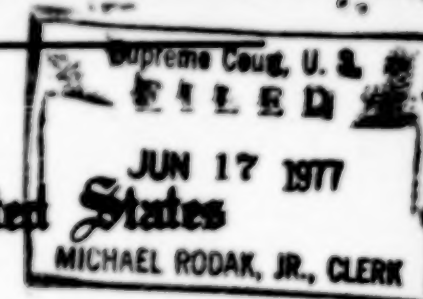


In The  
**Supreme Court of the United States**

October Term, 1976



No. 76-1412

JOHN BORLAND, JR., J. BARRON LEEDS, LOUIS  
POLEVOY, IRVING KAPLAN, IRVING LEVY, JOHN  
NICCOLLA, As Trustees of the Welfare Fund of Local 464,  
Amalgamated Meat Cutters Food Store, Employees Union,  
AFL-CIO and HOWARD MARKS,

*Petitioners,*

vs.

BAYONNE HOSPITAL, BERGEN PINES COUNTY  
HOSPITAL, BETH ISRAEL HOSPITAL, CLARA MAASS  
MEMORIAL HOSPITAL, ENGLEWOOD HOSPITAL

*(Continued on Reverse)*

*On Petition for Writ of Certiorari to the Supreme Court of the  
State of New Jersey*

**BRIEF IN OPPOSITION FOR RESPONDENT, HOSPITAL  
SERVICE PLAN OF NEW JERSEY (NEW JERSEY BLUE  
CROSS PLAN) (IMPROPERLY DESIGNATED AS THE  
BLUE CROSS-BLUE SHIELD PLAN OF NEW JERSEY)**

CLYDE A. SZUCH  
PITNEY, HARDIN & KIPP  
*Attorneys for Respondent,  
Hospital Service Plan of  
New Jersey*

P.O. Box 2008-R

RICHARD L. PLOTKIN  
JANE M. LANGSETH

163 Madison Avenue  
Morristown, New Jersey 07960

*On the Brief*

(201) 267-3333

10804

LUTZ APPELLATE PRINTERS, INC.

Law and Financial Printing

South River, N.J. New York, N.Y. Philadelphia, Pa. Washington, D.C.  
(201) 257-6850 (212) 840-9494 (215) 563-5587 (202) 783-7288

ASSOCIATION, GREATER PATERSON GENERAL HOSPITAL, HACKENSACK HOSPITAL, IRVINGTON GENERAL HOSPITAL, HOLY NAME HOSPITAL, THE HOSPITAL CENTER AT ORANGE, MONMOUTH MEDICAL CENTER, MORRISTOWN MEMORIAL HOSPITAL, MOUNTAINSIDE HOSPITAL, NEWARK BETH ISRAEL MEDICAL CENTER, RIVERDELL HOSPITAL, SADDLE BROOK HOSPITAL, SAINT BARNABAS MEDICAL CENTER, ST. MICHAEL'S MEDICAL CENTER, SOUTH AMBOY MEMORIAL HOSPITAL, ST. JOSEPH'S HOSPITAL, ST. MARY'S HOSPITAL OF HOBOKEN, ST. MARY'S HOSPITAL OF PASSAIC, THE BLUE CROSS-BLUE SHIELD PLAN OF NEW JERSEY, a corporation of the State of New Jersey,

*Respondents.*

JOHN BORLAND, JR., J. BARRON LEEDS, LOUIS POLEVOY, IRVING KAPLAN, IRVING LEVY, JOHN NICCOLLAI, As Trustees of the Welfare Fund of Local 464, Amalgamated Meat Cutters Food Store, Employees Union, AFL-CIO and HOWARD MARKS,

*Petitioners,*

vs.

RICHARD MC DONOUGH, Commissioner of Insurance of the State of New Jersey, and JAMES R. CO'WAN, M.D., Commissioner of Health of the State of New Jersey,

*Respondents.*

## TABLE OF CONTENTS

	<i>Page</i>
Opinions Below .....	3
Question Presented .....	3
Constitutional Provisions and Statutes Involved .....	4
Statement of the Case .....	5
Proceedings Before the Courts Below .....	5
The Design and Nature of Blue Cross in Contrast to Petitioner's Union Welfare Fund .....	7
Blue Cross Reimbursement Rates .....	10
Argument:	
I. The decisions below are in accordance with applicable decisions of this Court and no issue is presented which this Court should review. ....	12
Conclusion .....	18

## Contents

## Page

## TABLE OF CITATIONS

## Cases Cited:

Bon Air Hotel Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970) .....	4
Borland v. Bayonne Hospital, 72 N.J. 152, 369 A.2d 1 (1977) .....	3, 7
Borland v. Bayonne Hospital, 136 N.J. Super. 60, 344 A.2d 331 (App. Div. 1975) .....	3, 6
Borland v. Bayonne Hospital, 122 N.J. Super. 387, 300 A.2d 584 (Ch. Div. 1973) .....	3, 5, 8, 15
Borland v. McDonough, 135 N.J. Super. 200, 343 A.2d 97 (App. Div. 1975) .....	3, 6, 16
California State Auto Assoc. Inter-Ins. Bureau v. Maloney, 341 U.S. 105 (1951) .....	14
City of New Orleans v. Dukes, 427 U.S. 297 (1976) .....	13
Dandridge v. Williams, 397 U.S. 471 (1970) .....	14
Goldblatt v. Hempstead, 369 U.S. 590 (1962) .....	14

## Contents

## Page

Johnson v. Hospital Service Plan of N.J., 25 N.J. 134, 135 A.2d 483 (1957) .....	8
Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) ..	14
McGowan v. Maryland, 366 U.S. 420 (1961) .....	14
Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580 (1935) .....	14
Morey v. Doud, 354 U.S. 457 (1957) .....	13
Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) ..	14
New York Central R. Co. v. White, 243 U.S. 188 (1917) ....	14
Osborn v. Ozlin, 310 U.S. 53 (1940) .....	14
Reagan v. Farmers Loan & Trust Co., 154 U.S. 362 (1894) .	13
Travelers Ins. Co. v. Blue Cross of West Pennsylvania, 481 F.2d 80 (3d Cir. 1973), cert. denied, 414 U.S. 1093 (1973).	16
United States v. Wood, Wire & Metal Lath Int. U., Loc. No. 46, 471 F.2d 408 (2d Cir. 1973), cert. denied, 412 U.S. 939 (1973) .....	4
Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) .....	14

## Contents

	<i>Page</i>
<b>Statutes Cited:</b>	
29 U.S.C.A. §301 .....	9, 17
41 U.S.C.A. §1395f(b) .....	7
N.J.S.A. 17:48-1 .....	4, 7, 8, 15
N.J.S.A. 17:48-2 .....	7, 8, 15
N.J.S.A. 17:48-5 .....	8, 9
N.J.S.A. 17:48-6 .....	9, 15
N.J.S.A. 17:48-6.8 .....	9, 16
N.J.S.A. 17:48-7 .....	4, 7
N.J.S.A. 17:48-10 .....	8, 9, 15
N.J.S.A. 17:48-18 .....	9, 15
N.J.S.A. 26:2H-1 .....	4
N.J.S.A. 26:2H-18 .....	6, 16
N.J.S.A. 26-2H-18(b)(c) .....	4
N.J.S.A. 26:2H-18(d) .....	4, 7, 10, 15

## Contents

	<i>Page</i>
<b>United States Constitution Cited:</b>	
Fourteenth Amendment .....	3, 4, 5
<b>Other Authorities Cited:</b>	
Pub. L. No. 93-406, Title I, §111(a)(1), 88 Stat. 851 (1974) ..	9
20 C.F.R. 405.401(a) .....	7



---

In The

**Supreme Court of the United States**

October Term, 1976

---

No. 76-1412

JOHN BORLAND, JR., J. BARRON LEEDS, LOUIS  
POLEVOY, IRVING KAPLAN, IRVING LEVY, JOHN  
NICCOLLA, As Trustees of the Welfare Fund of Local 464,  
Amalgamated Meat Cutters Food Store, Employees Union,  
AFL-CIO and HOWARD MARKS,

*Petitioners,*

vs.

BAYONNE HOSPITAL, BERGEN PINES COUNTY  
HOSPITAL, BETH ISRAEL HOSPITAL, CLARA MAASS  
MEMORIAL HOSPITAL, ENGLEWOOD HOSPITAL  
ASSOCIATION, GREATER PATERSON GENERAL  
HOSPITAL, HACKENSACK HOSPITAL, IRVINGTON  
GENERAL HOSPITAL, HOLY NAME HOSPITAL, THE  
HOSPITAL CENTER AT ORANGE, MONMOUTH  
MEDICAL CENTER, MORRISTOWN MEMORIAL  
HOSPITAL, MOUNTAINSIDE HOSPITAL, NEWARK  
BETH ISRAEL MEDICAL CENTER, RIVERDELL  
HOSPITAL, SADDLE BROOK HOSPITAL, SAINT

---

BARNABAS MEDICAL CENTER, ST. MICHAEL'S MEDICAL CENTER, SOUTH AMBOY MEMORIAL HOSPITAL, ST. JOSEPH'S HOSPITAL, ST. MARY'S HOSPITAL OF HOBOKEN, ST. MARY'S HOSPITAL OF PASSAIC, THE BLUE CROSS-BLUE SHIELD PLAN OF NEW JERSEY, a corporation of the State of New Jersey,

*Respondents.*

JOHN BORLAND, JR., J. BARRON LEEDS, LOUIS POLEVOY, IRVING KAPLAN, IRVING LEVY, JOHN NICCOLLA, As Trustees of the Welfare Fund of Local 464, Amalgamated Meat Cutters Food Store, Employees Union, AFL-CIO and HOWARD MARKS,

*Petitioners,*

vs.

RICHARD MC DONOUGH, Commissioner of Insurance of the State of New Jersey, and JAMES R. COWAN, M.D., Commissioner of Health of the State of New Jersey,

*Respondents.*

*On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey*

**BRIEF IN OPPOSITION FOR RESPONDENT, HOSPITAL SERVICE PLAN OF NEW JERSEY (NEW JERSEY BLUE CROSS PLAN) (IMPROPERLY DESIGNATED AS THE BLUE CROSS-BLUE SHIELD PLAN OF NEW JERSEY)**

## OPINIONS BELOW

The opinion of the Supreme Court of the State of New Jersey in *Borland v. Bayonne Hospital* is reported at 72 N.J. 152, 369 A.2d 1 (1977) (reprinted as Addendum A to Petition).

The opinion of the Superior Court of New Jersey, Appellate Division, in *Borland v. McDonough* is reported at 135 N.J. Super. 200, 343 A.2d 97 (App. Div. 1975) (reprinted at page 82a of Appendix to Petition).

The opinion of the Superior Court of New Jersey, Appellate Division, in *Borland v. Bayonne Hospital* is reported at 136 N.J. Super. 60, 344 A.2d 331 (App. Div. 1975) (reprinted at page 81a of Appendix to Petition).

The opinion of the Superior Court of New Jersey, Chancery Division, in *Borland v. Bayonne Hospital* is reported at 122 N.J. Super. 387, 300 A.2d 584 (Ch. Div. 1973) (reprinted at page 32a of Appendix to Petition).

## QUESTION PRESENTED

Does a state statutory program which permits the operation of a closely regulated, non-profit hospital service prepayment plan to promote a broad based community health program violate the Equal Protection or Due Process Clauses of the Fourteenth Amendment because the rates at which the plan is permitted to reimburse hospitals for certain services are less than those charged by hospitals to other users for the same services?<sup>1</sup>

1. Petitioners also attempt to claim a denial of procedural due process by entry of a summary judgment in favor of respondent hospitals and Blue Cross.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provisions are the Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment to the United States Constitution.

The pertinent statutory provisions are N.J.S.A. 17:48-1 *et seq.*, particularly N.J.S.A. 17:48-7, and N.J.S.A. 26:2H-1 *et seq.*, particularly N.J.S.A. 26:2H-18)(b)(c) and (d) (Supp. 1977).<sup>2</sup>

(Cont'd)

This claim is wholly without merit. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970); *United States v. Wood, Wire & Metal Lath Int. U., Loc. No. 46*, 471 F.2d 408 (2nd Cir. 1973), *cert. denied*, 412 U.S. 939 (1973).

2. Article 1, Paragraph 1 of the New Jersey Constitution of 1947 which is cited by petitioners, has been interpreted to include state due process and equal protection rights. *Auto-Rite Supply Co. v. Mayor and Tp. Committeemen of Woodbridge Tp.*, 41 N.J. Super. 303, 311, 124 A.2d 612, 616 (1956). This provision is no longer involved in this case, however. R. 2:2-3(a) (appeals to Appellate Division from final agency action) and R.4:46 (summary judgment) are procedural rules which are unimportant here. Petitioners cite the following provisions of the New Jersey Constitution of 1947 as also being pertinent: (a) Article 1, par. 6 (freedom of speech and press), (b) Article 1, par. 7 (freedom from unreasonable searches and seizures), (c) Article 1, par. 8 (right to presentment or indictment of a grand jury), and (d) Article 1, par. 9 (right to trial by jury). These provisions are totally irrelevant. Petitioners also cite Article 1 §20 of the New Jersey Constitution of 1947 which prohibits the taking of private property for public use without just compensation. Petitioners' argument on this point is frivolous. The importance of N.J.S.A. 52:14B-1 *et seq.* and N.J.A.C. 8:31-14.4, cited by petitioners, is not at all apparent. The statute deals only with the procedure for agency enactment of rules. The regulation provides that initial 1975 rates shall be based upon elements of costs approved by the Commissioner of Health. Petitioners also cite 29 U.S.C. §147 *et seq.*, which appears to be a printing error, because no statute appears to have ever been so codified.

## STATEMENT OF THE CASE

This litigation concerns the differential in rates charged by respondent hospitals to Blue Cross for services rendered to Blue Cross subscribers, as compared with the rates charged by respondent hospitals to members of the public who are not Blue Cross subscribers. Petitioners are individual members and trustees of a union welfare fund which pays for services rendered by respondent hospitals at the same rates charged by such hospitals to commercial carriers and to other members of the general public who are not Blue Cross subscribers. Those rates are generally higher than those charged Blue Cross for certain services rendered by member hospitals to Blue Cross subscribers. *Borland v. Bayonne Hospital*, 122 N.J. Super. 387, 394 (Ch. Div. 1973).<sup>3</sup> Petitioners assert that this rate differential amounts to a deprivation of their due process and equal protection rights under Section 1 of the Fourteenth Amendment to the United States Constitution.

### Proceedings Before the Courts Below

Respondent hospitals moved before the trial court to dismiss the complaint for failure to state a cause of action against them on the grounds that the Blue Cross reimbursement rate is controlled by the Commissioners of Insurance and of Health. Blue Cross moved for summary judgment. The trial court treated the hospitals' motion as one for summary

3. Although for purposes of an application for summary judgment the trial court noted that the difference in rates was said to approximate 20%, *Borland v. Bayonne Hospital*, 122 N.J. Super. 387, 394 (Ch. Div. 1973), there was no specific finding on the amount of the differential in rates.



judgment and, after briefs and oral argument, granted summary judgment to respondent hospitals and to Blue Cross. Petitioners appealed this judgment to the Appellate Division of the Superior Court of New Jersey.

Respondents, Commissioners of Insurance and of Health, then moved to have the remainder of the case transferred to the Appellate Division of the Superior Court of New Jersey on the grounds that petitioners' assertions amounted to an appeal from the final determination of an administrative agency. R.2:2-3(a). That motion was granted (Petitioners' Appendix, 61a). Upon application by petitioners, the Appellate Division remanded the case against the Commissioners to the Commissioner of Insurance for the purpose of expanding the record as to the method used and the factors considered by the Commissioners in establishing the rates payable by Blue Cross as required by N.J.S.A. 26:2H-18 (Petitioners' Appendix, 62a).

The Commissioner of Insurance filed the Expansion of the Record on Remand which was verified by the affidavit of the Commissioner of Insurance. After considering the Expansion of the Record on Remand, the Appellate Division of the Superior Court of New Jersey ruled in favor of the respondents, Commissioners of Insurance and of Health, *Borland v. McDonough*, 135 N.J. Super. 200, 343 A.2d 97 (App. Div. 1975) and affirmed the summary judgment in favor of respondent hospitals and Blue Cross for the reasons expressed in the opinion of the trial court. *Borland v. Bayonne Hospital*, 136 N.J. Super. 60, 344 A.2d 331 (App. Div. 1975).

Petitioners then appealed to the Supreme Court of New

Jersey which affirmed the judgments of the courts below in a single opinion. *Borland v. Bayonne Hospital*, 72 N.J. 152, 369 A.2d 1 (1977).

#### **The Design and Nature of Blue Cross in Contrast to Petitioner's Union Welfare Fund**

Blue Cross exists under the authority of the Hospital Service Corporation Act, N.J.S.A. 17:48-1 *et seq.*, which permits the formation and operation of a non-profit corporation, without capital stock, to establish a non-profit hospital service plan. N.J.S.A. 17:48-1 (Supp. 1977), N.J.S.A. 17:48-2. Blue Cross contracts with subscribers for hospital service benefits and with hospitals to pay for covered hospital services rendered to subscribers. A hospital service corporation such as Blue Cross is authorized by statute to contract with a participating hospital for "rates of payment . . . in the form of a level *per diem* amount established for the particular hospital . . . for each day of health care services . . ." N.J.S.A. 17:48-7 (Supp. 1977). Payment by hospital service corporations for services rendered to its subscribers must be "at rates approved as to reasonableness by the Commissioner of Insurance with the approval of the Commissioner of Health"<sup>4</sup> and "[i]n establishing such rates, the commissioners shall take into consideration the total costs of the health care facility." N.J.S.A. 26:2H-18(d) (Supp. 1977).

#### **The design and purpose of the Hospital Service**

4. Congress has similarly required that payments to hospitals for services to Medicare beneficiaries be on the basis of "reasonable costs." 41 U.S.C.A. §1395f(b); 20 C.F.R. 405.401(a).



Corporation Act, N.J.S.A. 17:48-1 *et seq.*, is that of a broad based community health program which aims to satisfy the needs of hospitals and the community as a whole through a partnership between hospitals and a non-profit prepayment plan. *Borland v. Bayonne Hospital*, 122 N.J. Super. 387, 398-99 (Ch. Div. 1973) and authorities there cited. The goals of this partnership are (a) to provide the public a payment-in-advance method for financing care provided by hospitals and to guarantee payment to the hospitals; (b) to make hospital care needed by the public financially accessible to the largest number of people at the lowest possible cost; and (c) to help the community carry the social and economic burden created when people are unable to pay for the necessary care rendered by hospitals. *Borland v. Bayonne Hospital*, 122 N.J. Super. 387, 399 (Ch. Div. 1973) and authority there cited; cf. *Johnson v. Hospital Service Plan of N.J.*, 25 N.J. 134, 144, 135 A.2d 483, 488 (1957).

To best achieve the desired goal of the Hospital Service Corporation Act, the Legislature subjected Blue Cross to stringent state regulation. It must be organized without capital stock and may not be operated for profit or converted into a corporation organized for profit. N.J.S.A. 17:48-1 (Supp. 1977); N.J.S.A. 17:48-2. It may not operate except under a Certificate of Authority approved by the Commissioner of Insurance of the State of New Jersey, who grants approval if the operation of the hospital service plan is in the public interest. N.J.S.A. 17:48-5. It can be operated only for the benefit of its subscribers, N.J.S.A. 17:48-2, and is strictly limited as to the expenditures it may make for solicitation of subscribers and for administration. N.J.S.A. 17:48-10. Its funds may be invested only as permitted

for investment of funds of life insurance companies operating under the laws of the State of New Jersey, and it must maintain a special contingent surplus over and above its reserves and liabilities. N.J.S.A. 17:48-10. It is also exempt from every state, county, district, municipal and school tax other than taxes on real estate and equipment. N.J.S.A. 17:48-18. The board of directors of Blue Cross must be composed of persons who are representative of the member hospitals of the corporation, its subscribers and the general public. N.J.S.A. 17:48-5 (Supp. 1977). The provisions of Blue Cross' contracts with its subscribers are subject to stringent statutory limitations, including a prohibition against termination of coverage, in the absence of fraud or material misrepresentation by the subscriber, unless all contracts of the same type are terminated. N.J.S.A. 17:48-6 (Supp. 1977). The practices, rules and procedures for termination, refusal to renew coverage, modification of coverage or rates, selection of risks and underwriting classifications are subject to review by the State Commissioner of Insurance. N.J.S.A. 17:48-6.8 (Supp. 1977).

By contrast, petitioner trustees are not subject to the strict statutory controls imposed upon hospital service corporations. Plaintiff trustees provide benefits to members of the welfare fund subject only to general fiduciary obligations and the requirements of the Welfare and Pension Fund Disclosure Act, 29 U.S.C.A. §301 *et seq.*<sup>5</sup> That Act requires only the disclosure of certain information and provides for enforcement of those

5. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, Title I, §111(a)(1), 88 Stat. 851 (1974) repealed this chapter effective January 1, 1975, providing in part, however, that this chapter shall continue to apply to any conduct and events which occurred before January 1, 1975.

disclosure requirements. Furthermore, petitioner trustees operate not for the benefit of the general public, but for the benefit of the members of their own union welfare fund. Finally, petitioner trustees, if they so desired, could purchase Blue Cross benefits for the members of the union welfare fund under the same terms and conditions as others who are similarly situated.

#### **Blue Cross Reimbursement Rates**

Blue Cross reimbursement rates to hospitals are established by the Commissioner of Health and approved as to reasonableness by the Commissioner of Insurance. N.J.S.A. 26:2H-18(d). Blue Cross pays for covered outpatient services at the same rates as the general public and reimburses hospitals at a *per diem* rate for inpatient services. The *per diem* rate represents the average reimbursable cost per day for all hospital patients having characteristics consistent with those of patients who are Blue Cross subscribers.

The starting point for calculating the inpatient *per diem* rate for each hospital is the total expenses shown in the hospital's annual operating report. These total expenses are then reduced by the following:

1. cost of items that are normally subsidized,
2. types of expenses that actually result in non-operating income,
3. items of income which are actually a recovery of expenses,

4. cost of non-eligible services,
5. cash income from emergency care or alternative,
6. cost of outpatient care,
7. cost of home care and nursing home care.

Item one refers to research programs subsidized by special grants, donations, or funds. Item two refers to costs of operating coffee shops, gift shops, servicing of investments, solicitation of funds, and other programs which produce non-operating income. These items are eliminated because in a well-managed hospital, such programs should be self-supporting and have no impact on charges to any category of patients, whether it be Blue Cross subscriber or non-subscriber.

Item three includes types of income which are actually a recovery of expenses such as telephone income, laundry service provided at a charge to employees, meals for nurses, guests and employees, rental of quarters to employees and physicians, income from nurses' training schools, medical transcript fees and the like. These items are eliminated because Blue Cross should not be required to pay for hospital operations which are self-supporting and not included in the Blue Cross benefit package. It is also reasonable to exclude item 4, the cost of non-eligible services. Blue Cross subscribers pay such charges directly to the hospital.

The fifth, sixth and seventh items involve hospital operations related not to inpatient but to outpatient services for

which Blue Cross reimburses the hospital for eligible services on the basis of the hospital's general charges to the public. Therefore, they are not included in the calculation of the inpatient *per diem* rate (Expansion of the Record on Remand, 16-18).

The omission of these specified costs from the total hospital costs results in a particular *per diem* rate for inpatient services to Blue Cross subscribers which, contrary to petitioners' claims, fully reimburses the hospitals for services rendered to Blue Cross subscribers. The hospitals remain free to charge members of the public who are not Blue Cross subscribers at rates higher than those paid by Blue Cross.

On these facts, the Supreme Court of New Jersey unanimously and appropriately affirmed the rulings of the lower courts that petitioners' constitutional rights to equal protection and due process had not been violated.

## ARGUMENT

### I.

The decisions below are in accordance with applicable decisions of this Court and no issue is presented which this Court should review.

The statutes here involved are basically economic regulation of health care costs in the State of New Jersey. In economic regulation, this Court has persistently used a "rational basis" standard of review for governmental regulation and has not in

recent times struck down an economic regulation either on due process or equal protection grounds.<sup>6</sup> In *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), this Court noted that economic regulations are subject to a deferential standard of review and that rational distinctions may be made with substantially less than mathematical exactitude. The economic regulation in *City of New Orleans*, which was not held to be violative of equal protection, resulted in a prohibition of the business activities of the plaintiff, a consequence which petitioners herein have not and will not experience under the state regulation involved in this case.

Petitioners cite *Reagan v. Farmers Loan & Trust Co.*, 154 U.S. 362 (1894) for the proposition that the decision of the courts below does not comport with the precedents of this Court. In that case, the facts of which are wholly distinguishable from those *sub judice*, a railroad commission set rates which a railroad could charge at such a low level as to diminish the earnings of the railroad to such an extent that the railroad would not have been able to pay the interest on its debt obligations. Petitioners here can make no such contention.

In attacking the statutory scheme in relation to the admitted present difference in rates for inpatient services as between subscribers to Blue Cross and non-subscribers, petitioners have the burden of showing that a classification exists which does not bear a reasonable relationship to a permissible legislative

---

6. The only case in recent times to strike down an economic regulation on equal protection grounds is *Morey v. Doud*, 354 U.S. 457 (1957), and this Court explicitly overruled that case last year in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976).



objective and is essentially arbitrary. *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911). A classification having some reasonable basis is not invalid merely because in practice it results in some inequality. *Dandridge v. Williams*, 397 U.S. 471 (1970). The classification must be upheld and a statutory discrimination will not be set aside if any set of facts can reasonably be conceived to support it. *Id.* at 485; *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580 (1935).

The stated principles are especially supportive here of the constitutionality of the legislative scheme because a state has unquestioned power to legislate in the area of public health. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955). Indeed, in the field of insurance, "the power of the state is broad enough to take over the whole business, leaving no part for private enterprise." *California State Auto. Assoc. Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 110 (1951); *Osborn v. Ozlin*, 310 U.S. 53 (1940). A state may require the purchase of insurance or its equivalent, *New York Central R. Co. v. White*, 243 U.S. 188, 208-09 (1917), and may compel health insurance supported by employer contributions or by taxes. Cf. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917). The legislative objective here is unmistakably salutary and based on desirable and reasonable goals.

The legislative program is also rationally related to achieving the unquestionably permissible legislative goals. Reimbursement to the hospitals by Blue Cross provides the public with a payment-in-advance method for financing hospital

care and guarantees payment to the hospitals.<sup>7</sup> The legislative program keeps the cost of hospital care down by requiring (a) that the hospital service plan be organized on a not-for-profit basis, N.J.S.A. 17:48-1 (Supp. 1977), (b) that it be operated only for the benefit of its subscribers, N.J.S.A. 17:48-2, (c) that its expenditures for solicitation of subscribers and for administration be strictly limited, N.J.S.A. 17:48-10, (d) that it be exempt from every state, county, district, municipal and school tax other than taxes on real estate and equipment, N.J.S.A. 17:48-18, and (e) that payment for hospital services by a hospital service corporation be made at reasonable rates. N.J.S.A. 26:2H-18(d) (Supp. 1977).

The financial integrity and the non-profit status of the hospital service plan are insured in part by limitations on the investment freedom of the plan, N.J.S.A. 17:48-10, and the requirement for maintenance of the special contingent surplus over and above reserves and liabilities. *Id.* Accessibility to the largest number of people is fostered by the fact that subscription is open to the public, by the fact that Blue Cross is prohibited from termination of coverage, in the absence of fraud or material misrepresentation by the subscriber, unless all contracts of the same type are terminated, N.J.S.A. 17:48-6 (Supp. 1977), and by the fact that the practices, rules and procedures for termination, refusal to renew coverage, modification of coverage or rates, selection of risks and underwriting classifications are

7. It is interesting to note that although the hospitals reserved the right to challenge the sufficiency of reimbursement by Blue Cross, *Borland v. Bayonne Hospital*, 122 N.J. Super. 387, 395 (Ch. Div. 1973), they support the constitutionality of the statutes involved here. See Brief in Opposition to Petition for Writ of Certiorari of Defendant-Respondent Hospitals, pp. 9-16.

subject to review by the State Commissioner of Insurance. N.J.S.A. 17:48-6.8 (Supp. 1977). Under the statutory scheme, Blue Cross furnishes prepaid hospital service benefits at a reasonable cost to those who choose to subscribe to such plan and, by extending coverage to poorer risks, assists the community in carrying the social and economic burden of those who otherwise might not be able to pay part or all of their hospital bills and who thus would increase the burden of caring for indigents far beyond the reimbursement differential. See *Travelers Ins. Co. v. Blue Cross of West Pennsylvania*, 481 F.2d 80 at 82 n.8 (3d Cir. 1973), *cert. denied*, 414 U.S. 1093 (1973).

Petitioners continue to contend that because certain hospital costs are omitted before computation of the *per diem* rate for inpatient services, the Commissioner is not complying with the legislative mandate of N.J.S.A. 26:2H-18 that in establishing reasonable rates, "the commissioners shall take into consideration the total costs of the health care facility." This is a question of state statutory interpretation which was properly decided by the New Jersey courts and is not an issue for this Court. *Borland v. McDonough*, 135 N.J. Super. 200, 202 (App. Div. 1975). The statute only requires that the Commissioner "take into consideration" the total costs of the hospital in approving the rates. This the Commissioner does by beginning the calculation of the *per diem* for inpatient services with total operating expenses of the hospital. Furthermore, there is ample reason, as noted, for omission of each of the types of costs which are deducted by the Commissioner from total hospital costs in calculating the *per diem* rate for inpatient services. Indeed, to require the Commissioner to include all costs in establishing the *per diem* rate for inpatient services would divest him of his

discretionary powers, reduce his task to mere mechanics and subvert the legislative goal of control of rates at reasonable levels. Therefore, the method of calculating the inpatient *per diem* rate is not arbitrary.

The clear factual differences between Blue Cross and the petitioners' union welfare fund justify a difference in treatment as to rates paid for hospital services. In contrast to the purposes and goals of a hospital service plan, petitioners' union welfare fund is not organized for the benefit of the general public but to foster the private interests of its own members. The union welfare fund is not subject to the extensive state regulatory controls imposed upon Blue Cross. Plaintiff trustees provide benefits to members of the union welfare fund subject only to general fiduciary obligations and the requirements of the Welfare and Pension Fund Disclosure Act, 29 U.S.C.A. §301 *et seq.*, which requires only the disclosure of certain information. Thus, the union welfare fund and Blue Cross are not similarly situated and the difference in hospital rates between the two is a rational distinction which does not violate the due process or equal protection rights of petitioners.

**CONCLUSION**

For the foregoing reasons, petitioners present no special or important issue which this Court, in the exercise of its judicial discretion, should review, and it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

s/ Clyde A. Szuch

**PITNEY, HARDIN & KIPP**  
*Attorneys for Respondent*  
*Hospital Service Plan of New*  
*Jersey*

Richard L. Plotkin  
Jane M. Langseth  
*On the Brief*